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Washington, DC 20463

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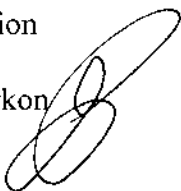
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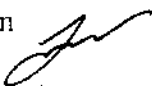
**AGENDA ITEM**  
For Meeting of: 08-14-03

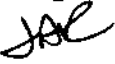
August 7, 2003


**MEMORANDUM**


TO: The Commission

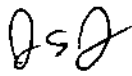
THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James A. Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

Mai Dinh   
Acting Assistant General Counsel

Jeff Jordan   
Staff Attorney

Subject: Draft AO 2003-16

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 14, 2003.

Attachment

# DRAFT

1 ADVISORY OPINION 2003-16

2  
3 Kenneth A. Gross, Esq.

4 Ki P. Hong, Esq.

5 Skadden, Arps, Slate, Meagher & Flom LLP

6 1440 New York Avenue, N.W.

7 Washington, DC 20005-2111

8  
9 Dear Messrs. Gross and Hong:

10  
11 This responds to your letter dated May 6, 2003, as supplemented by your letters  
12 dated June 4, and June 27, 2003, requesting an advisory opinion on behalf of Providian  
13 National Bank, a national bank subject to 2 U.S.C. § 441b ("the Bank") concerning the  
14 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and  
15 Commission regulations to a proposed affinity credit card program ("Affinity Program")  
16 between the Bank and any national party committee.<sup>1</sup>

17 The Commission concludes that the Affinity Program is permissible.  
18 Significantly, the Affinity Program will result in contributions from individuals and not  
19 from the Bank itself, distinguishing this program from others that the Commission has  
20 previously rejected.

## 21 *Background*

22 You explain that the Bank desires to enter into an Affinity Program arrangement  
23 with any national party committee that will serve as a sponsor. You note that in addition  
24 to the standard benefits provided to an affinity sponsor, which include background  
25 information on cardholders and co-branding opportunities, the national party committee  
26 will have the opportunity to receive contributions from affinity cardholders. Further, you

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<sup>1</sup> For purposes of this advisory opinion, the national party committee is presumed to be a "national committee" as defined in 2 U.S.C. § 431(14).

1 indicate that the Affinity Program arrangement will be commercially reasonable and  
2 arrived at through an arms-length negotiation between the Bank and the national party  
3 committee.

4 Officials associated with the national party committee may send solicitations for  
5 the proposed Affinity Program to individual prospects. The solicitations will not mention  
6 Federal candidates or otherwise promote the national party committee, but instead tout  
7 the opportunity to express general support for the national party committee.

8 You indicate that the proposed Affinity Program is distinguishable from other  
9 affinity credit card arrangements previously rejected by the Commission because of the  
10 addition of a rebate credit card and bonus feature. Specifically, the cardholders under the  
11 proposed Affinity Program will be afforded the option of voluntarily having the Bank  
12 forward to the national party committee rebates and bonuses that the cardholders  
13 accumulate through using their credit cards. You also state that the Bank will test market  
14 three types of affinity credit cards to determine which ones will be the most attractive to  
15 consumers and the most commercially advantageous for the Bank. These include a  
16 "basic card," a "rebate card," and a "value added card."

17 You indicate that for the basic card there will be no rebate or value added benefit  
18 to the cardholder. The only service the Bank will provide to the national party committee  
19 is the information derived from the pre-screening of the national party committee's  
20 mailing list, based on the credit-worthiness of the individuals on the list and their  
21 likelihood of applying for the credit card if offered by the Bank.

22 The second type, the rebate card, will permit cardholders to earn rebates by  
23 charging purchases on their credit card or accruing finance charges on their credit card

1 account. In addition to pre-screening the national party committee's mailing list, the  
2 Bank will provide the national party committee with contributions from cardholders who  
3 authorize the Bank to forward their rebates to the national party committee. Such  
4 authority may be granted to the Bank at the time the cardholder accepts the Bank's offer  
5 to receive a credit card or prior to the periodic distribution of the rebate. You note that  
6 the Bank will include a statement reminding cardholders of the \$25,000 annual  
7 contribution limitations to national party committees. If a cardholder does not wish to  
8 forward his or her rebate to the national party committee, the rebate will be sent to the  
9 cardholder instead. You state that the Bank will charge or obtain payment from the  
10 national party committee for any expenses related to sending the check, making the  
11 automated clearing house transaction, or using other commercially reasonable means of  
12 forwarding the contribution to the national party committee.

13 The third type of affinity card, the value added card, will offer cardholders  
14 incentives, such as points, for frequent use of their credit cards. The incentives can be  
15 redeemed for air flights, travel, hotel stays, merchandise, and entertainment. You state  
16 that the national party committee will not be involved in this part of the incentive  
17 program. The Bank will, however, offer cardholders the opportunity to earn additional  
18 points, if they contribute a certain amount to the national party committee. These  
19 additional points may also be redeemed for awards. You indicate that the national party  
20 committee will pay to a third-party vendor the fair market value of any rewards claimed  
21 by the cardholders as a result of the additional reward points.

22 The proposed Affinity Program will also offer a bonus feature with all three types  
23 of affinity credit cards. This consists of a payment to the cardholder from the Bank of a

1 certain fixed dollar amount once a cardholder charges a certain number of purchases or a  
2 certain dollar amount on an affinity credit card. You represent that this bonus feature is a  
3 common practice in the industry and will encourage credit card usage, which will benefit  
4 the Bank. The Bank will contact cardholders and ask them if they wish to authorize the  
5 Bank to forward the value of their bonuses to the national party committee. If  
6 cardholders do not wish their bonuses to be forwarded to the national party committee,  
7 the Bank will instead send the bonuses to them.<sup>2</sup>

8 You indicate that based on both the value of the mailing list and the national party  
9 committee's trademark, the national party committee will not be charged for the services  
10 the Bank provides to the national party committee under the Affinity Program, except  
11 that the national party committee will pay for the value of extra reward points under the  
12 affinity value added card and any expenses related to the Bank's transfer of funds to the  
13 national party committee.

14 You further state that the national party committee will pay for advertising space  
15 in the Bank's communications to cardholders or prospective cardholders. You note that  
16 the national party committee will purchase the advertising space at the same rate and  
17 under the same terms and conditions as non-affinity sponsor advertisers who purchase  
18 similar space. You also indicate that affinity sponsors are generally not required to pay  
19 for such advertising space. You add that these advertisements placed by the national  
20 party committee will not contain the names of Federal candidates or refer to elections,  
21 and will provide appropriate disclaimers that describe the prohibitions on contributions

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<sup>2</sup> As with the rebate card, the Bank will also include a statement in its correspondence to cardholders reminding them of the annual contribution limitations to national party committees.

1 from corporations, labor organizations, national banks, Federal contractors, foreign  
2 nationals, and minors. Also, a disclaimer will appear that indicates the communication  
3 was "paid for/authorized by" the national party committee. See 11 CFR 110.11.

4 ***Question presented***

5 May Providian National Bank enter into an agreement with a national party  
6 committee that gives affinity credit card holders the option of making political  
7 contributions to the national party committee out of rewards and rebates the cardholders  
8 have earned through the use of their affinity credit cards?

9 ***Legal Analysis and Conclusions***

10 The Bank may enter into such an agreement, subject to the conditions described  
11 below.

12 ***Applicable Statutes and Regulations***

13 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L.  
14 107-155, 116 Stat. 81 (2002) ("BCRA"), took effect. As amended by BCRA, the Act  
15 regulates receipt of contributions by national committees.<sup>3</sup> Specifically, 2 U.S.C.  
16 § 441i(a)(1) provides that, "a national committee of a political party (including a national  
17 congressional campaign committee of a political party) may not solicit, receive, or direct  
18 to another person a contribution, donation, or transfer of funds or any thing of value, or  
19 spend any funds, that are not subject to the limitations, prohibitions, and reporting  
20 requirements of this Act." Section 431(14) of the Act defines "national committee" to

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<sup>3</sup> Before BCRA, national party committee committees were able to raise and spend non-Federal funds (i.e., funds not subject to the limitations, prohibitions, and reporting requirements of the Act) using separate, non-Federal accounts.

1 include "the organization which, by virtue of the bylaws of a political party, is  
2 responsible for the day-to-day operation of such political party at the national level, as  
3 determined by the Commission."

4 The Act specifically prohibits a national bank from making a "contribution or  
5 expenditure in connection with any election to any political office, or in connection with  
6 any primary election or political convention or caucus held to select candidates for any  
7 political office." 2 U.S.C. § 441b(a). A "contribution" includes "any gift, subscription,  
8 loan, advance, or deposit of money or anything of value made by any person for the  
9 purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also*  
10 2 U.S.C. § 441b(b)(2). "Anything of value" is considered to include all in-kind  
11 contributions, including the provision of goods or services without charge or a charge that  
12 is less than the usual and normal charge for such goods or services. 11 CFR  
13 100.52(d)(1). Section 100.52(d)(2) defines "usual and normal charge for goods" as the  
14 price of those goods in the market from which they ordinarily would have been purchased  
15 at the time of the contribution.

### 16 ***Affinity Relationships***

17 In prior advisory opinions, the Commission has examined several different types  
18 of affinity relationships including affinity credit cards, telemarketing services, and certain  
19 pay-per-call services known commonly as "900-lines." *See* Advisory Opinions 1995-34,  
20 1994-33, 1991-26, 1991-20, 1990-14, 1990-1, 1988-12, and 1979-17. In Advisory  
21 Opinions 1988-12 and 1979-17, the Commission concluded that affinity credit cards  
22 programs described in those advisory opinions resulted in banks making impermissible  
23 contributions to local and national party committees. In contrast, the Commission has

1 concluded that contributions made by individuals using "900-line" services and  
2 telemarketing arrangements were permissible. Advisory Opinions 1995-34, 1994-33,  
3 1991-26, 1991-20, 1990-14, and 1990-1. As explained in further detail below, the  
4 Commission concludes that the proposed Affinity Program is more analogous to the facts  
5 presented in the advisory opinions concerning the "900-line" services and telemarketing  
6 arrangements than the advisory opinions involving affinity credit card programs.

7 In Advisory Opinion 1994-33, the requester proposed the sale and use of prepaid  
8 phone cards that were to be co-branded with the telemarketing firm's and political  
9 committee's logo. The proposed program allowed the phone card purchaser the option of  
10 designating a percentage of the card's purchase price to be a contribution to a political  
11 committee. The Commission found that this type of transaction avoided the possibility of  
12 a prohibited corporate contribution because the telemarketing firm would not be  
13 financing or advancing funds to the political committee. Instead, phone card purchasers  
14 would charge their contributions on their credit cards.

15 The Commission has also examined affinity relationships involving pay-per-call  
16 arrangements, where individuals can call a "900-line" to make political contributions  
17 using their credit cards. In these types of affinity relationships, the telemarketing firms  
18 retain any proceeds associated with their charge for the telephonic inquiry concerning the  
19 political committee, but the political committee receives the amount of the contribution  
20 charged to the contributor's credit card, minus the usual and normal service charges  
21 associated with making the credit card transaction. The Commission has generally  
22 viewed such arrangements as resulting in permissible contributions under the Act,  
23 because individuals, not the telemarketing firms, make contributions to the political

1 committees. The telemarketing firms, which collect fees from political committees only  
2 for its phone services, serve as a pass-through for the contributions. *See* Advisory  
3 Opinions 1995-34, 1991-26, 1991-20, 1990-14, and 1990-1.

4 In contrast with the "900-line" services and the pre-paid phone cards, the  
5 Commission determined that local and national party committees in the bank affinity card  
6 programs described in Advisory Opinions 1988-12 and 1979-17 did not provide  
7 "bargained for consideration" in exchange for the goods and services provided by the  
8 banks. In Advisory Opinion 1988-12, the bank would have shared with a local party  
9 committee the membership fees that cardholders paid to obtain the bank affinity card and  
10 would have included communications from the local party community in its monthly  
11 mailings to the cardholders. In Advisory Opinion 1979-17, the bank would have paid a  
12 commission to a national party committee based on either the number of persons who  
13 opened a bank affinity card account or a percentage of the total sales volume and finance  
14 fees charged to the bank affinity cards. It would have also included promotional or  
15 educational information in its monthly billing statements to its cardholders. In both of  
16 these instances, the party committees would have provided the bank with its mailing or  
17 membership lists and goodwill in exchange for the monthly mailing services and the  
18 membership fees or commission. The Commission concluded that the mailing or  
19 membership lists had little value because the information on those lists was publicly  
20 available and that goodwill was not consideration under 2 U.S.C. § 441b. Consequently,  
21 the banks in the affinity card programs described in these two advisory opinions would  
22 have made contributions to the local and national party committees because these  
23 committees did not provide adequate consideration to the banks. It is also important to

1 note that the party committee's share of the membership fees and commission would  
2 have been paid out of the bank's profits.

3 ***Proposed Affinity Program***

4 In examining the Affinity Program described in your request, the Commission  
5 must consider whether the goods and services provided by the national party committee  
6 and the Bank will be equal exchanges of bargained-for consideration in a commercial  
7 transaction and whether the contributions resulting from the rebates and rewards will be  
8 made by the individual cardholders or the Bank. As explained in further detail below, the  
9 Commission concludes that contributions arising from the rebates are permissible  
10 contributions made by the individual cardholders, and that the Affinity Program will  
11 constitute an equal exchange of bargained-for consideration if certain conditions are met.  
12 First, the Commission's regulations require that in order to avoid making a contribution,  
13 the compensation given to a political committee in return for goods or services, such as a  
14 mailing list, cannot exceed the "usual and normal charge." See 11 CFR 100.52(d)(2).  
15 Thus, the mailing list must have an ascertainable fair market value. Second, the list must  
16 be used in a commercially reasonable manner consistent with a *bona fide* arms-length  
17 agreement. See Advisory Opinion 2002-14. This advisory opinion assumes that your  
18 statement that the value of the mailing list alone is sufficient to cover the costs of the  
19 services provided by the Bank under the proposed Affinity Program is correct. It also  
20 assumes that this arrangement will be similar to most affinity programs between the Bank  
21 and non-political entities.

1 A. Affinity Basic Credit Card

2 The proposed affinity basic credit card will not involve a contribution from the  
3 Bank to a national party committee under the Act, as long as the exchange of the use of  
4 the national party committee's mailing list and use of its trademark for the Bank's  
5 services to the national party committee are of equal value. On this basis, the proposed  
6 affinity basic credit card is permissible under the Act.

7 B. Affinity Rebate Credit Card

8 Rebates that have vested are the property of the cardholder. The proposed  
9 Affinity Program will permit cardholders to choose whether or not to contribute part or  
10 all of their rebates to the national party committees. Consequently, contributions of  
11 cardholders' rebates would be treated as contributions from the cardholders' personal  
12 funds. Thus, unlike the bank affinity cards in prior advisory opinions in which the banks  
13 would have impermissibly contributed their funds in the form of commissions paid to the  
14 political committee, the Bank will not be making an impermissible contribution.  
15 Individual cardholders may make these contributions as long as they do not exceed the  
16 \$25,000 annual limit or the \$57,500 biennial limit and provided they are not foreign  
17 nationals, minors, or government contractors under 2 U.S.C. §§ 441e, 441k, and 441c,  
18 respectively.

19 Although your proposal does not describe in detail the process by which  
20 contributions will be forwarded to the national party committee, the Commission  
21 premises this conclusion on the assumption that such contributions will be transferred to  
22 the national party committee at the same time they otherwise would have been transferred  
23 to the cardholder if he or she had elected to retain the rebate. The Commission also notes

1 that the national party committee would pay the Bank for forwarding the contributions to  
2 them on behalf of the cardholder. *See* Advisory Opinion 2002-7.

3 Furthermore, the Bank's activities described in your request will not be improper  
4 facilitation of the making of contributions to the national party committee under 11 CFR  
5 114.2(f), provided that the activities are in the Bank's ordinary course of business as a  
6 commercial vendor and it charges the national party committee the usual and normal rate  
7 for its services. *See* 11 CFR 114.2(f)(1).

8 C. Affinity Value Added Credit Card

9 As an incentive to cardholders to make contributions to the national party  
10 committee, the Bank intends to offer rewards to its affinity value added credit cardholders  
11 that may include air flights, travel, hotel stays, merchandise, and entertainment. Because  
12 the national party committee will pay the fair market value of such rewards, the Bank will  
13 avoid providing an impermissible incentive to its cardholders for their contributions. *See*  
14 Advisory Opinion 1986-41 (employee bonuses for political contributions found to violate  
15 the Act and Commission regulations). Additionally, as with the affinity rebate credit  
16 card, the contributions arising out of the use of the affinity value added credit cards will  
17 be made directly by the individual cardholders. Moreover, the Bank would not be  
18 facilitating the transfer of contributions to the national party committee under 11 CFR  
19 114.2(f). *See* above. Therefore, the contributions resulting from the reward incentives  
20 are permissible under the Act, assuming they comply with the contribution limitations

under section 441a and reporting requirements under section 434(b), and assuming they do not come from foreign nationals, minors, or government contractors.<sup>4</sup>

#### D. Bonus Feature

The proposed bonus feature operates as does the rebate incentive associated with the affinity rebate credit card. For the reasons stated in the analysis of the affinity rebate credit card, the resulting contributions would be permissible contributions from individual cardholders.

#### E. Solicitations Through Advertising

The Commission concludes that the Bank would not make an impermissible contribution when the national party committee purchases advertising space in the Bank's mailings to its cardholders and prospects, under the facts as described in your request. It also assumes that the Bank does not incur any additional processing expenses associated with either the communications or promotional materials that are sponsored by the national party committee (*e.g.*, postage, additional paper, or labor expense). See Advisory Opinion 1979-17.

#### F. Disclosure of Contributor Information

Your request does not explicitly provide for the collection of contributor information necessary for the national party committee to file disclosure reports relating to the intended contributions. The Bank's forwarding of contributions to the national party committee does not relieve the national party committee from obtaining and disclosing contributor information, such as the contributor's address, occupation, and

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<sup>4</sup> The national party committee must report its expenses associated with its payment of the fair market value of the extra reward points earned by the affinity value added cardholders.

1 employer information. *See* 2 U.S.C. §§ 431(13), and 434(b)(3)(A); 11 CFR 100.12 and  
2 104.3(a)(4)(i). The Commission suggests that the Bank obtain the cardholder's current  
3 address, occupation, and employer (if the Bank does not already have this information)  
4 and forward the information to the national party committee at the same time that the  
5 cardholder authorizes a contribution to be made from their affinity credit card.

### 6 ***Conclusion***

7 This response constitutes an advisory opinion concerning the application of the  
8 Act and Commission regulations to the specific transaction or activity set forth in your  
9 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
10 any of the facts or assumptions presented, and such facts or assumptions are material to a  
11 conclusion presented in this opinion, then the Requestor may not rely on that conclusion  
12 as support for its proposed activity.

13 The Commission notes that this advisory opinion analyzes the Act, as amended by  
14 BCRA, and Commission regulations, including those promulgated to implement the  
15 BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a  
16 three-judge panel of the United States District Court for the District of Columbia ruled  
17 that a number of BCRA provisions are unconstitutional and issued an order enjoining the  
18 enforcement, execution, or other application of those provisions. *McConnell v. FEC*, 251  
19 F. Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S. Ct. 2268 (U.S. 2003).

1 Subsequently, the district court stayed its order and injunction in *McConnell v. FEC*, 253  
2 F. Supp. 2d 18 (D.D.C. 2003). The Commission cautions that the legal analysis in this  
3 advisory opinion may be affected by the eventual decision of the Supreme Court.

4 Sincerely,

5  
6 Ellen L. Weintraub  
7 Chair  
8

9 Enclosures (AOs 2002-14, 2002-7, 1995-34, 1994-33, 1991-26, 1991-20, 1990-14, 1990-  
10 1, 1988-12, 1986-41, and 1979-17)